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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AUGUSTINE CALDERA, Plaintiff and Appellant, v. DEPARTMENT OF CORRECTIONS AND REHABILITATION et al., Defendants and Respondents.	G048943 (Super. Ct. No. CIVDS1000177) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Brian S. McCarville, Judge. Affirmed in part, reversed in part and remanded.

Scolinos, Sheldon & Nevell and Todd F. Nevell for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, Jerald L. Mosley and Mark Schreiber, Deputy Attorneys General, for Defendants and Respondents.

* * *

Augustine Caldera, a correctional officer at a prison in Chino, brought this action against the State of California, the California Department of Corrections and Rehabilitation (CDCR) and James Grove for disability discrimination, harassment based on disability, hostile work environment, failure to accommodate, retaliation, failure to prevent discrimination and harassment and failure to investigate. The trial court granted summary judgment and summary adjudication of issues in favor of defendants.

We conclude that having a stutter constitutes a disability under the Fair Employment and Housing Act (FEHA). We further conclude the moving papers contain sufficient evidence for a trier of fact to reasonably find Caldera was discriminated against because he stutters. Additionally, from all of the papers submitted, we find a trier of fact could reasonably deduce Caldera was discriminated against and suffered an adverse employment action shortly after he filed a complaint about being mocked and mimicked for stuttering, that Caldera was subjected to harassment and a hostile working environment both because of his stutter and because he filed a complaint about being mocked for having a stutter, that defendants CDCR and the State of California failed to accommodate Caldera, that Caldera was retaliated against because he filed a complaint about being mocked for his stutter, and that defendants CDCR and the State of California failed to prevent and/or investigate discrimination against Caldera. We reverse entirely as to CDCR and the State of California, and affirm in part and reverse in part as to Grove.

I

FACTS

Evidence in Support of the Motion for Summary Judgment/Summary Adjudication of Issues

In their motion, defendants presented evidence that Caldera's job was to escort inmates to and from their mental health appointments in Cypress Hall. Caldera received treatment for his stutter when he was in elementary school. His stutter

is precipitated by his emotional feelings. His stutter has not interfered with his ability to perform his duties as an escort officer.

Grove is a correctional sergeant employed by CDCR at the prison in Chino. He worked as a supervisor in the administrative segregation unit in Palm Hall until he started as supervisor in Cypress Hall in the same unit in October 2008. Grove mocked and mimicked Caldera on five to 10 occasions, beginning in 2006. The first time followed a radio broadcast during the swing shift when there were "roughly over a hundred people" working. After Caldera broadcasted an announcement, Grove "came on the radio and mimicked what [Caldera] said." During the beginning of 2007, while Grove was a supervisor, Caldera was having a conversation with other people, and Grove mimicked what he said. There were other incidents in 2007 or 2008.

Another incident occurred on September 2, 2008, when Caldera was having a conversation with Dr. Victor Jordan, a coworker, and Caldera stuttered when using the names of two CDCR employees, one of them named Captain Pahel. When Caldera told Grove that if he continued mocking him, he would file a complaint, Grove mocked him again, in a stuttering profanity, ending with: "Make sure you get my name right."

Caldera filed a discrimination complaint against Grove with CDCR on September 2, 2008. On the printed form was a request for: "Description of the Complaint (Allegation) (*Who/What/Where/When/How, etc*.) The handwritten response states: "On Tuesday September 2, 2008 at approximately 1400 hours while standing in the RCC hallway in front of the doorway into Cypress Hall, I was having a conversation with a co-worker telling him about a meeting with Lietenant Neff and Captain Pahel, having a studdering disability, I studdered on . . . the words Captain and Pahel. Sargeant Grove who was standing in line in the doorway of Cypress, turned and looked at me and said 'CaCaCaptain PaPaPahel.' I looked at Sargeant Grove and told him 'You need to stop! If you continue mocking me I'll file on you.' Grove then stated to me 'I don't give

a fufufuck fififile on me, make sure you get my name right.' Several coworkers were witness to his mockery of my disability, which made me feel embarrassed, belittled, and harassed. There have been several incidents over the past months relating to Groves mockery toward me." (Errors in original.)

On September 9, 2008, EEO Coordinator[1] T.J. Padilla of the Division of Adult Operations of the California Institution for Men wrote to Caldera, stating: "[W]e have received and reviewed the formal Equal Employment Opportunity/Sexual Harassment (EEO/SH) complaint that you recently filed," and indicated the complaint would be forwarded to the Office of Civil Rights (OCR) for a determination whether or not it would be accepted for investigation. It further stated: "The employee you filed your complaint against will be advised of your complaint filing, provided with a copy of the Department's EEO/SH policies and advised that taking any retaliation against you is prohibited."

That same day, September 9, 2008, Padilla also wrote to Grove, informing him of the complaint received, and ordering him to "desist from engaging in such behavior" if he was engaging in "behavior that violates the Department's EEO/SH 'zero tolerance' policies." The letter further directs Grove not to retaliate against Caldera.

Shortly after Caldera filed a complaint against Grove, Grove was transferred into Caldera's unit and made his supervisor. On September 25, 2008, Caldera wrote to Padilla, the EEO coordinator about the reassignment of Grove as his supervisor, stating in part: "I feel that centrals Administration is intentionally trying to intimidate me into going out on stress by creating a hostile work environment for myself and peers." (Error in original.)

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[1] While not explained, we assume Padilla was the Equal Employment Opportunity coordinator between the prison and the Equal Employment Opportunity Commission (EEOC).

Once Grove started as Caldera's supervisor on October 6, 2008, Caldera filed a charge of discrimination with the FEHA. A few days later, he requested a reasonable accommodation for his disability, specifically asking to be transferred out from under Grove's supervision. Caldera said: "In response, the State of California failed to conduct a timely good faith reasonable accommodation process and [Caldera] remained under the supervision of [Grove] . . . ." Caldera felt he was in a hostile work environment, and in his deposition explained that Grove "was constantly monitoring my area. He was — he was verifying my shift swap paperwork [when two officers swap shifts with each other]. There [were] times when he needed stuff done. Instead of coming right — right to me, he would go to coworkers, you know, to come to me saying that certain things needed to be done. In my presence in front of him, I was — I was treated differently than my coworkers." He further said Grove was "consistently critical" of his performance. This environment caused Caldera to "experience symptoms of paranoia, anxiety, emotional distress and depression."

Even after Grove ceased to be Caldera's direct supervisor in July 2009, Caldera said he continued to discriminate against him. Grove went on to become supervisor of the certification training department. According to Caldera, he had previously spent "50-75% of each year serving as a certified Training Department Instructor," but once Grove became supervisor, other, noncertified employees were given that assignment. As a result, Caldera feared losing his certification.

Although Caldera states in his answers to interrogatories that he requested the accommodation of being removed from Grove's supervision, the return to work coordinator at Chino declared "[t]he files do not contain any requests for reasonable accommodation." Caldera "never made me aware that he required a reasonable accommodation for a speaking disability so that he could perform his job as a correctional officer."

The OCR determined Caldera's complaint was not an EEO violation. The allegation was referred to Warden Poulos as the "Hiring Authority" and described as "a supervisory issue on or about October 14, 2008." The investigator added: "Grove made inappropriate comments on September 2, 2008 but Caldera suffered no tangible harm and there have been no further incidents between Caldera and Grove."

On October 7, 2008, Grove was provided a written list of his job expectations. The list is signed by both Grove and Lieutenant G. De Los Santos, Grove's supervisor. It states all radio transmissions must be professional, and that staff transmitting must "use a calm and normal voice tone." On November 13, 2008, C.Y. Tampkins, associate warden, wrote a letter to T.J. Padilla, the EEO coordinator, in which he described the meeting between De Los Santos and Grove, and concluded that "[t]his issue has been resolved at the supervisory level."

On December 1, 2008, Caldera wrote a letter to the California Institution for Men at Chino. He described Grove's conduct and stated he filed a complaint about the September 2, 2008 incident after "having dealt with his previous mockery in the past." He also stated he felt Grove was "just given a slap on the hand" because the administrators handling his complaint all previously worked together in Lancaster.

On January 27, 2009, L.J. Neff, facility captain, authored a memorandum to Tampkins, in which he stated: "Officer Caldera stated there is not any hostile work environment at this time, but felt there could be at any moment. Officer Caldera emphasized his feelings of an elevated level of anxiety when Sergeant Grove was in the unit." Neff also wrote: "Sergeant Grove stated there is no problem[] with Officer Caldera and there would not be any further problems of this nature with Officer Caldera. Sergeant Grove stated Officer Caldera is a good officer and he (Officer Caldera) continues to do a good job for him in Cypress Hall."

On June 2, 2009, Caldera wrote to the warden and assistant warden, stating: "I am uncomfortable with the way in which Sargeant Grove interacts with me. Whenever he is in my presence, he appears to be hypervigilent, observing every thing that I do. The manner in which he treats me appears to be different than how he conducts himself with my coworkers. This situation has caused me to experience paranoia, anxiety, and distress. I feel that his behavior is creating an environment which is difficult for me to work in." (Errors in original.)

An October 29, 2009 note is from someone with the first name of Lisa to someone with the first name of Debra, and states: "In response to your questions: [¶] Yes. Grove was placed in as the Cypress ASU Sergeant on October 6, 2008. There was no reason to block the move as the complaint was already rejected for having no EEO issues as well as corrective action had already been taken on . . . Grove's behavior. [¶] The complaints by Caldera after the initial one was that he 'anticipated' further bad behavior, not that he experienced any. Therefore, there was no need to make any personnel moves. Grove did ultimately leave and move to IST on 9/14/09. [¶] I will be faxing the personnel assignment printouts for both as soon as I get access to a fax machine."

Evidence in Opposition to Motions for Summary Judgment and Summary Adjudication of Issues

Much of the opposition evidence is the same as the evidence in support of the motions. Only additional evidence will be stated here.

Caldera has had a speech impairment, a "severe stutter," since age 12, which causes him "an enormous amount of shame and anxiety." Grove repeatedly mocked and mimicked Caldera to his face. On one occasion, Grove mocked him in the presence of others. At first, Caldera ignored him and walked away angrily from the situation.

On September 11, 2008, Caldera learned that Grove was to become his supervisor. When he learned of the plan to have Grove directly supervise Caldera, Caldera describes in his declaration what he did: "On Monday, September 15, 2008, when I arrived at work I asked to speak to Captain B.P. Pahel, Lieutenant E.J. Hernandez and Lieutenant L.J. Neff regarding my complaint about Sergeant Grove and his proposed reassignment to be my direct supervisor. That same day, I was told that Lieutenant Neff spoke with Associate Warden C.Y. Tampkins and Captain M. Hill about the proposed reassignment. [¶] On September 18, 2008, Lieutenant Gerard De Los Santos called me into his office and confirmed that he was going to move Sergeant Grove into Cypress Hall despite my concerns and the concerns of Lieutenant Neff. He said that as long as Grove remains professional he can move him anywhere he wants."

On September 29, 2008, Caldera met with the warden about the situation, and the warden told him he would look into the matter. Sergeant Lara told Caldera that during an October 3, 2008, meeting of supervisors for electrified fence training Sergeant Lara asked Sergeant Grove how he was and Grove responded by stuttering: "Everything is fine except for Ca-Ca-Ca-Caldera." On October 6, 2008, Grove became Caldera's direct supervisor.

On October 14, 2008, Caldera received a letter informing him that his discrimination complaint was rejected because, "The allegation does not violate Equal Employment Opportunity or Sexual Harassment laws and/or policies. Caldera's stuttering disability is not recognized as a disability under EEO law, although it is recognized by ADA as a disability," and "The allegation has been referred to the Hiring Authority of the CIM as a supervisory issue."

Caldera appealed to the State Personnel Board, stating: "I feel that the Department intentionally made this supervisor my immediate supervisor after I contested this fact following the chain of command all this way up to the Warden my statements to

administration were that I being harassed, being treated discourteous, it was employee misconduct, abuse of authority, and they would be creating a hostile work environment, administration chose to ignore my feeling of this incident."

Caldera also filed a formal complaint for discrimination and harassment with the EEOC. With regard to his request for accommodation, when he did not get a response, he wrote to the State of California, Division of Adult Operations, California Institution for Men, to the attention of the inspector general. In his letter, he stated: "Having dealt with his previous mockery in the past, I advised Grove on this date that he needed to stop or I would file a complaint on him."

On January 8, 2009, FEHA informed CDCR that it would not conduct an investigation or issue an accusation, and that "this letter is also your right-to-sue notice." Caldera wrote another letter to the EEOC enforcement supervisor on January 9, 2009, regarding the failure of CDCR to take any action. In the letter, he stated: "I continue to have feelings of anxiety, fear of being watched for what I say or did in the presence of Sagreant Grove." (Error in original.)

On June 6, 2009, Caldera wrote a letter to the California Institute for Men at Chino in which he states he was being singled out by Grove to verify certain forms, while his coworkers, who were required to file the same forms, were not asked for verification.

In his declaration, Caldera states he "remained under the supervision of Sergeant Grove for approximately 1 year. When Grove was then transferred to a new position, I was told by the attorney for CDCR (at the State Personnel Board hearing on December 1, 2009) that they had reasonably accommodated me by removing Grove from the position of my supervisor." Caldera also declares that "while acting as my direct supervisor, Sergeant Grove continued to harass and discriminate against me. He treated

me differently than other employees. He was consistently critical of my performance without a legitimate basis and discriminated against me in my assignments and opportunities. He was constantly monitoring my work area."

Caldera adds in his declaration that even after Grove was transferred, he continued to harass him. As an example, Caldera declares: "In the 15 years before Sergeant Grove was assigned as the training officer for the range, I served as range master 50-75 times. After Grove's assignment, I was not called to serve on the range." Caldera went to Grove's supervisor and explained that he needed instructor hours to maintain his certification, but got no response to his concern.

In his deposition, coworker Robert Konrad testified inmates, supervisors and staff teased Caldera about his stutter. He described an incident he overheard in which Grove made fun of Caldera's stutter on a radio broadcast: "Caldera called our immediate supervisor, and the response back from the supervisor was complete stuttering." Konrad described Caldera's reaction as shock.

De Los Santos, a lieutenant who started working at CDCR at Chino in 2007, described Grove as a big guy with the nickname of Rhino. He said Caldera had a couple of different nicknames, Mumbles and Machine Gun. When asked whether or not he thought Caldera was justified in filing his lawsuit, De Los Santos said, "I think he's a liar."

In his deposition, Grove testified he was employed by CDCR for about five years and was aware Caldera had a stutter. He denied he mimicked Caldera. Grove said that because of Caldera's complaint, he was reprimanded by De Los Santos.

Neff answered the following questions in his deposition about Grove acting as Caldera's supervisor:

"Q. And so if Grove were to be moved to Cypress Hall, he would be in a position supervising Caldera?

"A. Correct.

"Q. And given the history and given that Grove wouldn't stop mocking Caldera's speech when he asked him to, Caldera was concerned about that reassignment?

"A. Yes.

"Q. So what did you tell him in response to his concern?

"A. I told him that we were going to speak to Captain Hill and Associate Warden Tampkins to see if that was actually the case and give them our — my opinion and my captain's opinion.

"Q. And so what was your opinion?

"A. That based on the history that they shouldn't move Grove into a direct supervisory role.

"Q. Meaning again, based on the history of what had happened between these two individuals that it wouldn't be a good idea to have Caldera working under the supervision of the person that he alleged to have done this to him?

"A. Correct.

"Q. And so did you express that opinion to anyone?

"A. Yes, I did.

"Q. Who did you tell it to?

"A. Captain Hill and A.W. Tampkins."

Neff went on to testify he also informed Hill and Tampkins of Caldera's feelings of anxiety over being supervised by Grove. When asked how the two responded, Neff said: "Their response was that they weren't going to be held hostage to the complaint, basically."

Court's Ruling on the Motions for Summary Judgment and Summary Adjudication of Issues

The trial court granted defendants' motions for summary judgment and summary adjudication in a lengthy order. The court concluded no triable issues of fact exist.

II

DISCUSSION

Summary Judgment/ Summary Adjudication of Issues

Summary judgment "provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citations.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence . . . ." (Code Civ. Proc., § 437c, subd. (c).) The trial court properly grants a motion for summary judgment if all the papers submitted establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.) Because a successful summary judgment motion denies the losing party a trial, the papers of the moving party are strictly construed while those of the losing party are liberally construed. (*Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4th 1620, 1627.)

"[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

"A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code of Civ. Proc., § 437c, subd. (p)(2).)

"The rules applicable to summary judgments apply equally to motions for summary adjudication. [Citation.]" (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 732.) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code of Civ. Proc., § 437c, subd. (f)(1).)

"We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion . . . and the uncontradicted inferences the evidence reasonably supports. [Citation.]" (*Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 148.) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party . . . ." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

First Cause of Action, Disability Discrimination.

Caldera does not argue Grove is liable under this cause of action. Caldera pleads that he was discriminated against by CDCR in two ways. First he was repeatedly mocked and mimicked because of his stutter. Second, he alleges he was subjected to an adverse employment action by being forced to work under the direct supervision of Grove. His claims are made under section 12940 of the Government Code, et seq. as well as 42 U.S.C. section 12101 et seq. of the federal Americans with Disabilities Act of 1990.

It is an unlawful employment practice for an employer, because of a physical or mental disability, to discriminate against an employee in the conditions or privileges of employment. (Gov. Code, § 12940, subd. (a).) It is an unlawful employment practice "[f]or any employer . . . or person to discharge, expel, or otherwise discriminate against any person because the person has . . . filed a complaint . . . under this part." (Gov. Code, § 12940, subd. (h).)

"The FEHA was enacted 'to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . physical disability, mental disability, [or] medical condition . . . . [¶] . . . [¶] It is the purpose of [the FEHA] to provide effective remedies that will eliminate these discriminatory practices.' [Citation.] Thus the FEHA prohibits an employer from discriminating because of a disability against employees or applicants for employment 'in compensation or in terms, conditions, or privileges of employment.' [Citations.]" (*Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, 148.)

The California Supreme Court has adopted a three-stage burden-shifting test in FEHA employment discrimination cases: "[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A

prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff. [Citation.]" (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214-215.)

"[A] proper standard for defining an adverse employment action is the 'materiality' test, a standard that requires an employer's adverse action to materially affect the terms and conditions of employment [citation] . . . ." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036.) If an employer offers a legitimate, nondiscriminatory reason for the adverse employment decision, a plaintiff bears the burden to prove the employer's proffered reason is pretextual. (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 656.)

With regard to Caldera's allegation he was discriminated against when Grove mocked and mimicked his stutter over a period of two years, there is evidence in CDCR's papers that Grove, a supervisor, at first in another area, and later Caldera's supervisor, mimicked and mocked Caldera's speech impairment five to 10 times over two years for the purpose of humiliating him, all causing Caldera to feel "embarrassed, belittled, and harassed." As to the second kind of discrimination plaintiff claims, that CDCR allegedly forced Caldera to work under the direct supervision of Grove, the person allegedly responsible for repeatedly mimicking and mocking Caldera's stutter, CDCR contends no adverse action was taken against Caldera.

According to the moving papers, within days of Caldera's officially complaining about being tormented by Grove, CDCR made the decision to have Grove

become his supervisor. Also within CDCR's moving papers is evidence that, once Grove became his supervisor, Caldera was treated differently in that Grove bypassed him when things needed to be done, constantly monitored his performance and was consistently critical of him. CDCR's papers further state that as a result of Caldera being under Grove's supervision, Caldera experienced paranoia, anxiety and distress.

According to Grove's supervisor, De Los Santos, the reassignment of Grove to Cypress Hall, where Caldera worked, just days after Caldera filed his complaint, was routine in that "[a]ssignments follow procedures set forth in the agreement between the State of California and California Correctional Peace Officers Association." Thus, CDCR produced evidence that there was a legitimate reason for Grove's transfer into Cypress Hall to supervise Caldera. Under these circumstances, we will now consider Caldera's evidence.

Caldera produced evidence that De Los Santos called him a liar. Also, there is evidence in the opposition that Grove and De Los Santos had worked together in the past at another location and were friends. Further, during his deposition, De Los Santos at first said he and Grove did not socialize, but when it was pointed out to him that he told a different story in a telephone interview, he admitted he and Grove socialized a few times. Caldera declared that before Grove became his supervisor, Caldera was assigned to be range master 50 to 75 times. After Grove became his supervisor, Caldera stated he was not again given that assignment.

Additionally, De Los Santos was asked in his deposition whether he took any steps to look into Caldera's complaint of discrimination. He answered: "No, because it's a rumor." Yet Grove told an interviewer that because of the complaint filed by Caldera, he was reprimanded by De Los Santos.

From all of the evidence produced by Caldera, we find he met his burden with substantial evidence in his opposing papers. Under the circumstances in this record,

we find a fact finder could reasonably conclude CDCR discriminated against Caldera because of his stutter, discriminated against him by transferring Grove to become his supervisor, and that the reasons given by De Los Santos for the transfer are pretextual.

Second Cause of Action, Harassment Based on Disability and Third Cause of Action, Hostile Work Environment

Caldera contends both CDCR and Grove are liable under these causes of action.

It is an unlawful employment practice "[f]or an employer . . . or any other person . . . because of . . . physical disability, mental disability, medical condition . . . . to harass an employee . . . ." (Gov. Code, § 12940, subd. (j)(1).) "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (Gov. Code, § 12940, subd. (j)(3); *Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1427.)

"[L]iability for harassment is broader than liability for discrimination. [L]iability for harassment, which extends to 'any person' and hence extends to 'individuals,' encompasses individual supervisory employees. Liability for discrimination, by contrast, is limited to the 'employer' only." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 65.)

"The law prohibiting harassment is violated '[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is '"sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."' [Citations.]" (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263-264.) "And the issue of whether an employee was subjected to a hostile environment is ordinarily one of fact." (*Id.* at p. 264.)

"Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) . . . has no express provision addressing workplace harassment, but courts have construed Title VII's prohibition against discrimination to include harassment that is sufficiently severe or pervasive to alter the conditions of employment." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706, fn. 7.) "Under Title VII, sexual harassment is considered 'severe or pervasive' only when it '"'alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment.'"' [Citation.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1942.) ". . . Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatory abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 22.) The California Supreme Court has held that harassment under FEHA must also be severe or pervasive." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466.)

Evidence in defendants' motion for summary judgment is sufficient for a trier of fact to reasonably conclude Caldera was harassed over a two-year period because of his disability for the purpose of humiliating him, and that he was, in fact, humiliated as a result of the harassment. Under these circumstances, we conclude a trier of fact could reasonably conclude harassment against Caldera was both severe and pervasive, and that defendants have not met their burden, so that the burden never shifted to Caldera.

Even had the summary judgment burden shifted to Caldera to show his harassment was severe or pervasive, Caldera met that burden with evidence that it was both severe and pervasive. In Caldera's papers, he has deposition testimony of Robert Konrad that inmates, supervisors and staff teased Caldera about his stutter. Konrad

described an incident he overheard in which Grove made fun of Caldera's stutter on a radio broadcast, and he described Caldera's reaction as "shock."

Fourth Cause of Action, Failure to Accommodate

Caldera argues that CDCR is liable under this cause of action, and makes no argument Grove is also liable.

"The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling." (Gov. Code, § 12926.1, subd. (b).) [¶] Physical and mental disabilities "under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the federal Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act . . . ." (Gov.Code, § 12926.1, subd. (c).)

Under FEHA, a physical disability includes, but is not limited to a disease or disorder or anatomical loss that affects a bodily system, including "speech organs," and limits a major life activity. Such a condition limits a major life activity "if it makes the achievement of the major life activity difficult." (Gov. Code, § 12926, subds. (k)(1)(A) and (B)(ii).) (Stats. 2004, ch. 700 § 4.) Under the Americans with Disabilities Act (ADA), a major life activity includes "speaking" and "communicating." (42 U.S.C., § 12102 (2)(A).)

Government Code section 12926, subdivision (*l*) states the Legislature intended broad coverage for those suffering from disabilities. We know from section 12926, subdivision (*l*) [now subdivision (m)] that "if the definition of 'disability' used in

the federal Americans with Disabilities Act of 1990 . . . would result in broader protection of the civil rights of individuals with a mental disability or a physical disability . . . then that broader protection or coverage . . . shall prevail . . . ." (Stats. 2013, ch. 76 § 86.) In this case, the State of California wrote to Caldera on October 14, 2008, stating: "Caldera's stuttering disability is not recognized as a disability under EEO law, although it is recognized by ADA as a disability."

In a case involving a man whose speech was impaired as a result of a stroke, the court stated: Speaking, like walking, is deemed to be a major life activity under California law. (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 313.)

Considering the state of the law, we conclude Caldera's stutter is a disability within the meaning of both federal and California law. There is evidence Caldera requested an accommodation, to be removed from under Grove's supervision.

It is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation." (Gov. Code, § 12940, subd. (m).) "For an employer . . . to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).)

In their moving papers, defendants produced evidence that Caldera's stutter does not interfere with his ability to perform his duties as an escort officer. They also produced a portion of Caldera's deposition where he answered the question: "Is there anything in particular that precipitates your stuttering?" Caldera responded: "My

emotional feelings at the time, my emotional feelings period. And it's just — it's just something." At that point in Caldera's response, counsel interrupted him and redirected the questioning. Defendant's moving papers further show that in October 2008 Caldera requested that he be accommodated for his disability by being removed from Grove's supervision.

Thus the state of the showing in the moving papers is that, while Caldera is physically able to perform his job duties, his stuttering is precipitated by his emotions. Under those circumstances, according to the moving papers, shortly after Caldera filed a complaint about the humiliation he was undergoing due to Grove's taunts and mockery, CDCR transferred Grove to become Caldera's supervisor. An inference reasonably deducible from this evidence is that Caldera is better able to perform his job duties when he is not placed in an overly emotional state as a result of someone actually mocking him for his stutter, or in a state of fear that mocking and mimicking his stutter might happen.

There is also evidence CCDR did not want to remove Caldera from Grove's supervision, the accommodation requested, because they "weren't going to be held hostage to the complaint." We note that we find nothing in the moving papers to indicate the accommodation requested by Caldera might amount to an "undue hardship" as set forth in Government Code sections 12926, subdivision (u) or 12940, subdivision (m).

"The question of whether the employer must provide reasonable accommodation involves a case-by-case inquiry. [Citations.]" (*McCullah v. Southern Cal. Gas Co.* (2000) 82 Cal.App.4th 495, 500.) What on its face might look only like a personnel issue, might be an accommodation issue as well. A case involving a high-risk pregnancy, in which an employee had exhausted all the pregnancy leave allowed, was found to be a situation calling for an accommodation. The court found: "A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341.)

In the instant case, Caldera has a disability and he requested an accommodation. There is no evidence CDCR conducted a reasonable accommodation process or that Caldera's requested accommodation would create an undue hardship for CDCR. Under these circumstances, we must conclude the trial court erred in granting defendant CDCR's motion with regard to Caldera's fourth cause of action.

Fifth Cause of Action, Retaliation for Engaging in Protected Activity

Caldera contends both CDCR and Grove are liable under this cause of action. "The FEHA protects employees against retaliation for filing a complaint or participating in proceedings or hearings under the act, or for opposing conduct made unlawful by the act. [Citation.]" (*Miller v. Department of Corrections*, *supra*, 36 Cal.4th at p. 472.) It is an unlawful employment practice "[f]or any employer . . . or person to . . . discriminate against any person because the person has . . . filed a complaint . . . under this part." (Gov. Code, § 12940, subd. (h).)

"[I] in order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation '"'drops out of the picture,'"' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

The protected activity in the instant matter is an employee filing a complaint about disability discrimination. The adverse employment action alleged is that

the very person who mimicked and mocked Caldera, Grove, was made his supervisor shortly after Caldera filed his complaint, and as a direct result of Caldera's complaint about Grove.

The California Supreme Court was called upon to decide whether or not the use of the word "person" in subdivision (h) of Government Code section 12940, compels the conclusion that all persons who engage in retaliation are personally liable. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162-1163.) The high court concluded "that the employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Id.* at p. 1173.) Accordingly, the trial court correctly dismissed Grove from the retaliation cause of action.

As discussed above, Caldera produced substantial evidence from which a trier of fact could reasonably conclude CDCR's transfer of Grove did not have a legitimate basis, but was the result of bias against Caldera and in favor of Grove, as well as a desire to retaliate against Caldera for filing a complaint.

Sixth Cause of Action, Failure to Prevent Discrimination and Harassment and Seventh Cause of Action, Failure to Investigate

In Caldera's brief, he contends these causes of action are against defendant CDCR only. "An entity shall take all reasonable steps to prevent harassment from occurring." (Gov. Code, § 12940, subd. (j)(1).) It is an unlawful employment practice for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k).)

FEHA promotes early investigation. (*Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939.) It is an unlawful employment practice for an employer who knows or should have known of harassment of an employee to fail to take immediate and appropriate corrective action. (Gov. Code, § 12940, subd. (j)(1).)

Here moving party CDCR's papers included evidence that Grove broadcast his mockery over the prison radio, that he openly mocked Caldera in supervisor meetings and in front of other employees. While moving party's papers include evidence De Los Santos spoke with Grove about the importance of being professional and gave Grove a list of job expectations, including a requirement that radio broadcasts be professional, there is no indication Grove's conduct toward Caldera was included in the discussion or the list. CDCR also submitted evidence that "during the month of October 2008 all Reception Center Central staff inclusive of Sgt. Grove were provided EEO training," but there is no indication that training had anything to do with Grove's treatment of Caldera. Under these circumstances, we must conclude CDCR has not met its burden and that the burden never shifted to Caldera regarding these causes of action.

III

DISPOSITION

As to defendant CDCR, the judgment is reversed in its entirety. As to defendant Grove, the judgment is affirmed with regard to the first, fourth, fifth, sixth and seventh causes of action, and reversed with regard to the second and third causes of action. The case is remanded to the trial court for further proceedings. Appellant is awarded his costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.